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September 9, 2013

REPLY TO: **DELTONA**

Ms. Ayesha N. Kahn, Esquire
Mr. Gregory M. Lipper, Esquire
Americans United for Separation of Church and State
1301 K Street N.W.
Suite 850, East Tower
Washington, DC 20005

Re: Seal of the City of DeLand, Florida

Dear Ms. Kahn and Mr. Lipper:

I serve as the City Attorney for the City of DeLand, Florida and in that capacity your letter of August 23, 2013 has been forwarded to me for response. At the outset, I would point out that the legal analysis in your letter fails to consider the law of the 11th Circuit in which the City of DeLand is located. In particular you do not analyze *King v. Richmond County*, even though your organization is credited with filing an amicus brief in the case. Moreover, your letter does not mention *Van Orden v. Perry* which will most likely provide the controlling law in the 11th Circuit as of this date. Most notably, however, it is obvious from your letter that you are not aware of the history surrounding the adoption of the city's seal, much of which can be easily found on the city's web site. One might expect that you would have completely researched the facts and done a thorough analysis of the law related to the city's seal before demanding that we stop using our seal after 131 years. Nevertheless, an outline of both the facts and relevant law is provided below for your benefit.

As mentioned above, your letter fails to consider both *Van Orden* and *King*. *King* was decided prior to the Supreme Court's ruling in *Van Orden*, and it was the last time that the 11th Circuit had the opportunity to address an Establishment Clause case. It is apparent that the 11th Circuit will be required to follow the analysis laid out in *Van Orden* when it next has the opportunity to consider an Establishment Clause case. Regardless of whether we analyze this issue under *Lemon* or the more recent and history-centric approach in *Van Orden*, the result is the same.

The first inquiry is whether there is a secular purpose for the use of the seal. Unlike the history of the tablet of the Ten Commandments in *King*, which was lost in "the mists of time", there is an abundance of richly documented history regarding the City of DeLand's seal. The following information is an excerpt regarding the history of the City taken directly from the City of DeLand's web site:

History of DeLand

...

Henry A. DeLand ... had met several of the settlers in the area. Henry DeLand described them as being a fine group of people to form the nucleus of a town, dedicated to the advancement of education and culture.

...

Early in life, DeLand had adopted the conviction that if he became a financial success he would give any money, over and above a set sum, for benevolent purposes. Over the years he had prospered and he decided that now was the time to use his profits for the betterment of mankind. Thus, from the beginning, DeLand was unique for its time. It didn't just spring up haphazard out of the wilderness - it was carefully planned by the man destined to be its founder.

...

Henry A. DeLand returned to DeLand with one goal in mind, the creation of a town based on culture and education.

Further information regarding the history of our city is available on the City's web site at www.deland.org.

From the minutes of the Old Settlers Society taken on Feb 22, 1895, we learn the following:

Henry DeLand was present at this meeting and was asked to talk on "How You Came Here, and What You Came For."

"He said his first visit to Florida was without fixed purpose, merely sightseeing and a complete rest from business. The next two or three visits were with a definite purpose, to do good and help others help themselves."

DeLand was a community uniquely ahead of its time in Florida. It was intended from its beginning to be a community rich in education, culture and charitable acts. DeLand is home to Florida's first private university, and although now relocated, was home to

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Florida's first law school. The City's dedication to enlightenment in education and culture are the reasons that DeLand is nicknamed the "Athens of Florida".

The minutes of all meetings of the City Commission dating back to the City's incorporation in 1882 are maintained to this day by the City Clerk and available for your inspection. The minutes of the very first meeting of the City Commission on March 11, 1882 reveal the following:

Resolved: That we adopt for our own the name of DeLand.

Resolved: That our seal be the size of the silver dollar, with the words "DeLand, Volusia County, Florida" in a circle near the margin, the centre to contain the emblems of "Faith, Hope and Charity," over the figures 1882.

Henry DeLand's vision for the city he founded was one in which the people would have opportunities for education and cultural enlightenment, and where charitable acts would abound amongst citizens who would regularly help one another. In recognition of this laudable and secular vision for the city, the founding fathers chose the obvious symbol for the city's seal – the symbol of 'faith, hope and charity'. It was fortuitous that the symbol happened to derive from Christianity. Nothing in the history of the City's seal suggests that it was adopted to promote any particular religion or even religion in general.

As the United States Supreme Court has stated:

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations.

Lynch v. Donnelly, 465 U.S. 668, 680 (1984). You would be unable to show, beyond question, that the adoption of the City's seal was motivated "wholly by religious considerations." In fact, the clear and abundant history proves otherwise.

Furthermore, the fact that the symbol within the City's seal happens to derive from Christianity is of no import in the constitutional analysis. As the Supreme Court went on to say in *Lynch*:

We are unable to discern a greater aid to religion deriving from inclusion of the crèche than from these benefits and endorsements previously held not violative of the Establishment Clause. What was said about the legislative prayers in *Marsh* ... and implied about the Sunday Closing Laws in *McGowan* is true of the City's inclusion of the crèche: its "reason or effect

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merely happens to coincide or harmonize with the tenets of some ... religions.” (citations omitted)

Id. at 682. As the United States Supreme court has more recently stated:

Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause.

Van Orden v. Perry, 545 U.S. 677, 690 (2005). As you well know, many other decisions recognize that the Establishment Clause does not prohibit all religious references. Much like in *Weinbaum v. City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008) and *Murray v. City of Austin*, 947 F.2d 147 (5th Cir. 1991), there is a direct relationship between the symbol in the City’s seal and the City’s founding father. Thusly, it is clear that City’s seal passes constitutional muster when considering the purpose for the adoption of the City’s seal.

We next turn to the question of how observers reasonably view the seal. Whether we analyze this issue under the “effects prong” of the *Lemon* test or under the more historically and contextually oriented analysis in *Van Orden*, the result is the same. The 11th Circuit laid out the effects prong as follows:

In religious-symbols cases ... we ... must inquire whether observers would reasonably believe that the government’s use of a predominantly religious symbol sends a message of governmental endorsement of religion.

King v. Richmond County, Ga., 331 F.3d 1271, 1282 (11th Cir. 2003). Although, as you point out in your letter, the entire symbol is, in fact, a Christian symbol, most observers recognize only the cross as a religious symbol. The most prominent symbol in the seal is a heart. To most observers, even in this context, the heart does not suggest that the City is promoting Christianity, or even religion in general. The 11th Circuit was confronted with a similar situation when it considered the placement of a sword in a seal with the tablet of the Ten Commandments. The court wrote about this issue as follows:

Appellants argue that the sword is a Christian symbol that enhances the religious effect of the Seal. We conclude, however, that the superior court’s use of the sword cuts the other way when applying the effect test. Although the sword might occasionally serve as a symbol of Christianity, the sword is among the most recognizable symbols of the secular legal system.

Id. at 1283-84. Similarly, the heart is a symbol commonly associated with compassion and charity – which were amongst the primary motivations for the formation of the city. The heart is the most prominent symbol in the City’s seal. While some observers may

nevertheless perceive the City's seal to mean that the City is promoting religion, this fact alone does not offend the Establishment Clause. In addressing a similar argument, the United States Supreme Court wrote:

The dissent asserts some observers may perceive that the City has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, arguendo, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid."

Lynch, 465 U.S. at 683. Most reasonable observers will see the city's seal as standing for the largely secular principals of faith, hope and charity that DeLand was founded upon. When FDR addressed the Democratic National Convention in 1936, he spoke of faith, hope and charity in the context of the governance of our nation when he said, in part:

We do not see faith, hope, and charity as unattainable ideals, but we use them as stout supports of a nation fighting the fight for freedom in a modern civilization.

Faith — in the soundness of democracy in the midst of dictatorships.

Hope — renewed because we know so well the progress we have made.

Charity — in the true spirit of that grand old word. For charity literally translated from the original means love, the love that understands, that does not merely share the wealth of the giver, but in true sympathy and wisdom helps men to help themselves.

FDR's view of faith, hope and charity is emblematic of how an objective observer, acquainted with the history and implementation of DeLand's seal, would perceive it.

Lastly, credence should be given to the long and rich history of the City's seal. In his concurring opinion in *Van Orden*, Justice Breyer wrote about the importance of history as follows:

As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence

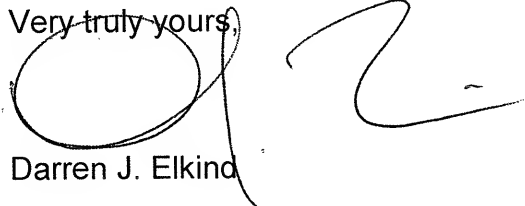
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suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief." (citation omitted)

Van Orden v. Perry, 545 U.S. at 702. So too does the City of DeLand have a rich and storied history of faith, hope and charity. For 131 years the City's seal has endured without objection or challenge, no reasonable observers having been 'injured' by seeing it. Notably, the City of DeLand has been prominently displaying its seal more than three times as long as the monument which was at issue in *Van Orden*.

Based upon the history and foregoing legal analysis, it is apparent that the City of DeLand's seal does not violate the Establishment Clause. As such, the City of DeLand is not required to remove or otherwise discontinue using the seal. I would also like to point out, as a purely practical matter for your consideration, that the City has been flooded with offers of support, legal and financial, from organizations across the country. If your organization chooses to file suit against the City of DeLand, we will have these resources at our disposal, and there will be no lack of will or financial support for defending the continued use of our seal. Hoping that you will consider the foregoing information in good faith and in good conscience, I am

Very truly yours,


Darren J. Elkind

DJE/kk
#12339

cc: Mayor and Commissioners
Michael P. Pleus, City Manager
Julie A. Hennessy, City Clerk